Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

DEPARTMENT OF PRACTICE, PLEADING AND EVIDENCE.[1]

PEOPLE EX REL. CONNOR *v.* STAPLETON ET AL.[2]
SUPREME COURT OF COLORADO.

Liability for Contempt.

A newspaper article, implying that the Supreme Court has been induced by improper influence to delay rendering a decision, will make the editor and manager of such paper liable to punishment for contempt.

The power of the Supreme Court to punish for contempt is not limited to the cases specifically enumerated in the Code of Civil Procedure.

STATEMENT OF FACTS.

A little more than three years before the date of the above case, three persons, of whom the relator was one, having been convicted of conspiracy and sentenced, brought the record to the Supreme Court for review. As it seemed probable from an examination of the record that prejudicial error had been committed, a supersedeas was granted, and the case took its regular place on the docket. No motion was made to have it advanced, and it was reached in due order, nearly three years after the conviction. While it was still under consideration, the relator, by his counsel, presented a sworn petition to the Court, setting forth, *inter alia*, that the respondents had published the following in their newspaper. "It is humiliating to the whole State that a man like Jim Connor could have influence enough to prevent the highest tribunal from handing down a decision in his case. There must be influence of some kind at work somewhere." "It would be interesting to know what mysterious but evidently power-

[1] The subject of this annotation makes it improper that the Editor-in-Chief of the Department of Practice should be connected with it. It is therefore published under the sole authority of the general editors.

[2] Reported in 33 Pac. Rep., 167.

ful influence has retarded the machinery of justice so strikingly in this case. It would also be interesting to know how soon the Supreme Court can make up its mind to render a decision upon that appeal;" and "Every day the Supreme Court allows to pass without its taking action on the appeal of the Connor brothers is an encouragement to commit crime. The city should have been rid of these men long ago. There can be no earthly excuse for the Supreme Court in any manner shielding them from the punishment they so richly deserve."

Upon the presentation of this petition, the Court entered a rule against the respondents, requiring them to appear and answer in writing why they published the articles aforesaid, on the ground that the charges made therein were designed to interfere with and embarrass the Court in the due and impartial administration of justice. The answers being insufficient to clear the respondents, a writ of attachment was issued against them, and one was brought into court, the other being temporarily absent from the State. The former apologized very humbly, as did the latter on his return, and the Court thereupon dismissed the proceedings against them, on payment of costs.

NEWSPAPER CONTEMPTS.

Without going into a detailed analysis of the subject of contempts, for which the reader is referred to the excellent works of Rapalje and Oswald, and a very able and scholarly article by Charles Chauncey, Esq., in the AMERICAN LAW REGISTER for February–July, 1881, Vol. 20, pp. 81, 145, 217, 289, 361, 425, it is sufficient to say that contemptuous publications in a newspaper come under the head of constructive contempts, which includes all those not actually committed in the presence of the court, or in disobedience of its decrees, and against the author of which, therefore, the court cannot, as a general rule, proceed of its own motion.

The power to punish contempts of all kinds is one that is inherent in all courts. It is essential to preserve their dignity, and the impartial administration of justice; and can only be taken from them by the same power to which they owe their existence. In view of these general principles, let us examine (1) What publications in a newspaper are in contempt of court? (2) How far the right to punish for such contempts may be affected by legislative action? and (3) What is the proper procedure in such cases?

I. *What Newspaper Publications are in Contempt of Court?* The old English rule on this subject was very stringent. It was, at one time, even asserted that to publish the proceedings of a court of justice, without any comment, good or bad, thereon, was punishable as a contempt. But this was an extreme view; and the generally accepted doctrine was that laid down by Lord HARDWICKE, *in re* St. James Evening Post, 2 Atk., 469, to the effect that contempts consisted either in scandalizing the court itself, abusing parties concerned in suits, or in "prejudicing mankind against persons before the cause is heard." This is still followed, and the rule in England is that *any* publication assailing the integrity of the court, or having reference to a cause pending, is technically a contempt: Vernon *v.* Vernon, 40 L. J. Ch., 118, though the rigor of this has been much abated in practice, and those publications only are *punished* as contempts which tend to unduly influence or embarrass the administration of justice, by reflecting unfavorably upon the character or conduct of either the parties to a cause: *Ex parte* Turner, 3 Mont., D. & D., 523; Robson *v.* Dodds, 17 W. R., 782; *Re* Tyrone Election Petition, 7 Ir. R. C. L., 242; Tichborne *v.* Tichborne, 39 L. J. Ch., 398; Tichborne *v.* Mostyn, 7 L. R. Eq., 55; Peters *v.* Bradlaugh, 4 Times L. R., 414; *Re* Crown Bk., 44 Ch. Div., 649, or the witnesses, Littler *v.* Thompson, 2 Beav., 129; Felkin *v.* Herbert, 10 Jur. (N. S.), 62; S. C., 33 L. J. Ch., 294; or on the merits of the suit, Daw *v.* Eley, 7 L. R. Eq., 49. Such are publications imputing fraud and imposture to a party: Tichborne *v.* Tichborne, 39 L. J. Ch., 398; perjury to a witness, Littler *v.* Thompson, 2 Beav., 129; and fraud and misconduct to the directors of a corporation for the winding up of which a petition was pending: *Re* Crown Bank, 44 Ch. Div., 649. While a suit was pending to restrain the infringement of a patent, the solicitor of the defendants took part, under an assumed name, in a discussion as to its novelty, and, on motion of the plaintiff, was held guilty of contempt in so doing: Daw *v.* Eley, 7 L. R. Eq., 49. The mere publication, without comment, of a petition for the winding up of a corporation, containing charges of fraud against the directors, is a contempt: *Re* Cheltenham & Swansea Ry. Carriage & Wagon Co., 8 L. R. Eq., 580; S. C., 17 W. R., 463. It has even been held a contempt to publish an interview with a defendant, containing what purported to be statements made by her of what occurred at her examination before a liquidator, on the ground that it was most important that the liquidator should be able not only to gain information as to the operations of the company in liquidation, but to keep it in his own hands until the proper time came to make use of it: *Re* American Exchange in Europe, 58 L. J., Ch., 706. But it is necessary that the publication be one calculated to injuriously affect the administration of justice, and consequently, where an injunction had been granted to restrain the defendants from infringing a patent for nickel-plating, and they thereupon gave notice of appeal, and published in a newspaper an advertisement inviting the trade to subscribe towards the expenses of the appeal, and also an advertisement

offering a reward of £100 to any one who could produce documentary evidence that nickel-plating was done before 1869, these advertisements were held no contempt, because all persons engaged in the trade of plating had a common interest in resisting the plaintiff's claim, and because there was nothing in the second advertisement to interfere with the course of justice: Plating Co. *v.* Farquharson, 17 Ch. Div., 49.

As a proceeding to punish for contempt is essentially a criminal proceeding, *scienter* must be proved; and when the editor of the newspaper was ignorant of the fact that an action had commenced with reference to the matters commented upon it was held that it would not be proper to punish him: Met. Music Co. *v.* Lake, 58 L. J. Ch., 513. See also Daw *v.* Eley, 7 L. R. Eq., 49.

It will appear from this that the severity of the ancient rule is now very materially modified in practice; and the rule now followed is that when the publication, though technically a contempt, is not likely to interfere seriously with the administration of justice, it will not be punished as a contempt, and if the punishment of the offender is moved for, the party moving shall not have his costs: Vernon *v.* Vernon, 40 L. J. Ch., 118; Hunt *v.* Clarke, 37 W. R., 724.

When the publication has no reference to any cause, but is a pure libel on a judge, it is no contempt. This question has only recently been decided. Chief Justice YELVERTON, of the Bahamas, was offered a present of some pineapples by a suitor in whose favor he had recently given judgment, which he refused. Shortly after he referred to the matter from the bench, stating that it was a very wrong thing to make him such an offer. In a few weeks a letter was published in the *Nassau Guardian*, commenting in a very sarcastic manner upon the conduct of the Chief Justice in various respects, and thus referring to the pineapples: "Search the annals of the bench of every country, of every age, and I defy creation to produce a more noble, more self-denying and more virtuous exhibition of a tender conscience than was afforded by our Chief Justice in refusing to accept a gift of pineapples? Some cynic has said, 'Every man has his price.' It is assuring to this community to know that the 'fount of justice' in this colony is above the price of even one dozen pineapples. Mr. Yelverton's noble words of scornful renunciation should be graven in letters of gold upon the walls of every magisterial office in this colony; then, and not till then, will sweet potatoes, pigeon peas, etc., cease to exert their baneful influence on the administration of justice in this colony," etc., etc. Chief Justice YELVERTON committed the editor for contempt, but when the matter was brought before the Privy Council they held that the article, though libellous, could not be construed as a contempt of court: *Re* Special Reference from the Bahama Islands [1893], App. Cas., 138. [For a detailed discussion of the English cases on this subject see article on Contempt of Court by Newspapers, 24 Ir. L. T., 323, 337.]

In America, the technicalities of the English rule have been discarded in theory as well as in practice, and no publication is held a

contempt unless it be made with reference to a cause pending, and have a tendency to interfere with or embarrass the court in the impartial administration of justice. But if a publication has such a tendency, it is everywhere held punishable; and any newspaper publication, editorial or contributed, made pending a suit, and reflecting upon the court, the jury, the parties, the witnesses, the counsel, the officers of the court, etc., with reference to the suit, or tending to influence the decision of the controversy, is a contempt of court, and as such is punishable by attachment: Hollingsworth *v.* Duane, Wall. C. Ct., 77; State *v.* Kaiser, 20 Or., 50. It is a contempt to charge a judge with "deliberate lying about the law, deliberate intentional falsification in his official capacity and deliberate intentional denial of justice," etc., in reference to a cause pending: *Ex parte* Barry, 85 Cal. 603; to publish an article impeaching the integrity of the court, and seeking to intimidate it by a threat of popular clamor: People *v.* Wilson, 64 Ill., 195; or reflecting in any manner upon the conduct of the court in reference to a case before it: People *v.* Freer, 1 Caines (N. Y.), 485; Myers *v.* State (Ohio), 22 N. E. Rep., 43; *Respublica v.* Oswald, 1 Dall., 319; or charging members of the Supreme Court with having attended a political caucus, and in that caucus advising the action out of which the pending suit arose: State *v.* Frew, 24 W. Va., 416. So, too, it is a contempt to publish articles reflecting upon the grand jury or the sheriff: Fishback *v.* State (Ind.), 30 N. E. Rep., 1088; Allen *v.* State (Ind.), 30 N. E. Rep., 1093; *re* Cheeseman, 49 N. J. L., 115; or on the character of a pending criminal prosecution: *re* Sturoc, 48 N. H., 428; or other cause: Cooper *v.* People, 13 Colo., 337.

In opposition to the power to punish for such contempts, it has been urged that the power was too arbitrary and liable to abuse to be consistent with our free institutions; but this claim has been invariably rejected. "Power must be lodged somewhere; and that it is possible to abuse it is no argument against its proper exercise:" Myers *v.* State (Ohio), 22 N. E. Rep., 43. The next resort has been the threadbare argument of the liberty of the press, which has been so often stripped of its fallacies and exposed to public scorn that it has by this time almost lost the power to blush at the naked effrontery of its own false pretences. Argument against this claim is wasted. It is sufficient to say that it never prevails, and that "the freedom of the press does not license unrestrained scandal:" Cooper *v.* Peo., 13 Colo., 337.

There is but one case which militates against this rule. *In re* MacKnight (Mont.), 27 Pac., 336, an article to the following effect, "An old Montanian, who is familiar with the . . . Davis Will Case, . . . said: 'Prejudice? Why, of course there is prejudice. I tell you there is money enough in this business to corrupt every corruptible man in the State. . . . Unless a change of venue is granted, the jig is up for the contestants of the will,'" was held not a contempt. Just why, is rather difficult to gather from the vague oratory of the opinion. The language of the article would certainly seem to bring it within the rule laid down above. But the case stands alone,

and cannot prevail against the weight of authority to which it stands opposed.

It is also a contempt to publish grossly inaccurate accounts of the proceedings in a court (*Re* Deaton, 105 N. C., 59), and to publish any account whatever of such proceedings, when forbidden: R. *v.* Clement, 4 B. & Ald., 218; U. S. *v.* Holmes, 1 Wall. Jr., 1. But this latter is a direct contempt.

If the publication relate to a cause that has been decided, so far at least as the court assailed is concerned, it is a mooted question whether or not it can be punished as a contempt. It is very strongly argued that it can, in State *v.* Morrill, 16 Ark., 384, and State *v.* Galloway, 5 Coldw. (Tenn.), 326, but this is as strongly controverted in Dunham *v.* State, 6 Iowa, 245; Storey *v.* Peo., 79 Ill., 45, and Cheadle *v.* State, 110 Ind., 301, and the dispute would seem to be settled in favor of the latter opinion by the almost unanswerable argument in State *v.* Sweetland (S. Dak.), 54 N. W. Rep., 415: "The object of contempt proceedings is not to enable a judge who deems himself aggrieved to punish the supposed wrong-doer to gratify his own personal feelings, but to vindicate the dignity and independence of the court, and to prot tect himself and those necessarily connected with it, while a matter is pending before it, from insolen and contemptuous abuse calculated to intimidate, influence, embarrass or impede the court in the exercise of its judicial functions, or prevent a fair and impartial trial." But does this go far enough? May not a suitor who has appealed his case, or the appellee, be as much injured by the publications subsequent to the trial as by those made while it is pending? To put an instance, is it not the tendency of an accusation of unfairness or corruption on the part of the trial judge to induce the appellate court to reverse his judgment? And this being so, might not a suitor who had fairly won his suit in the court below be injured by a reversal for such reasons? The object of contempt proceedings is "to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters" (*re* St. James Evening Post, 2 Atk., 469), and they also, not the judge alone, are to be protected. True, the appellate court might treat such an action as a contempt of it; but those courts are slow to do so.

If the comments published have no reference to any cause, either pending or determined, but are mere libels on the judge or other functionaries, they are not contempts: State *v.* Frew, 24 W. Va., 416; State *v.* Sweetland (S. Dak.), 54 N. W. Rep., 415; *re* Spooner, 5 N. Y. City Hall Rec., 109.

The rule in regard to publications in newspapers made by those who are peculiarly within the jurisdiction of the court, as parties and attorneys, is rather more stringent. Thus in Montana, where, as we have seen, the rule in regard to strangers is very loose, it was held a contempt for a suitor to procure the publication of a fictitious set of facts in relation to the case under adjudication, to which he was a party, which facts were brought to the notice of the court: Ty. *v.* Murray, 7 Mont. 251; S. C., 15 Pac. Rep., 145; and any publication by an attorney, disparaging the character, assailing the conduct, or

impeaching the integrity of the court, will be a contempt, whether in reference to a cause or not, and will subject him to disbarment, if he does not purge himself: *Re* Moore, 63 N. C., 397; *ex parte* Biggs, 64 N. C., 202; *contra*, State *v.* Anderson, 40 Iowa, 207.

It may not be amiss to call attention to the fact that in spite of the claim that the summary process for contempt is liable to abuse, the courts are in most instances absurdly lenient in their treatment of offenders. Although it is true that a denial of the plain meaning of the language used is theoretically insufficient to purge the contempt (Peo. *v.* Freer, 1 Caines (N. Y.), 485; Fishback *v.* State (Ind.), 30 N. E. Rep., 1088), yet in practice it has almost invariably been suffered to have that effect. This was so in the principal case (Peo. *v.* Stapleton (Colo.), 33 Pac. Rep., 167), where the accusations were too gross to be readily passed by, and in many other cases. It would really seem as if this leniency was mistaken. The license of the press, which in our days has reached a pitch that is not only disgraceful but disgusting, would be effectually checked by a judiciously severe use of the powers of the court.

II. *How far can the Right of the Court to Punish for Contempts be Affected by the Action of the Legislature?*—As has been said, the power is inherent in the courts, springing into existence as a necessary incident of their creation, and absolutely essential to the preservation of their dignity: *Re* Cheeseman, 49 N. J. L., 115. This being the case, it would follow of necessity that only the power that created the court can take away this right of self-protection; and accordingly the better opinion is that where a court owes its existence to the Constitution, the legislature cannot infringe upon its powers in this respect: State *v.* Morrill, 16 Ark., 384; State *v.* Frew, 24 W. Va., 416; Peo. *v.* Stapleton (the principal case) (Colo.), 33 Pac. Rep., 167. This is so clear, that even in *ex parte* Hickey, 4 Sm. & M. (Miss.), 751, where the power to punish for contempts not enumerated in the statute was denied, a strong effort was made to prove that it was repugnant to the spirit of the constitution—a fallacy well exposed in State *v.* Morrill, *supra*. Some courts have acquiesced in legislative limitations (*re* Oldham, 89 N. C., 23; Myers *v.* State (Ohio), 22 N. E. Rep., 43), but that acquiescence is purely voluntary. When, however, a court is created and its powers defined by the legislative branch of the government, it of course remains subject to its control, and may be by it deprived of its inherent rights: Poulson's Case, 15 Haz. Pa. Reg., 380.

In many of the States it has been attempted to limit this power to punish for constructive contempts, either indirectly, as in Ohio and North Carolina, by defining what contempts may be punished summarily, so excluding all others, or by expressly limiting the power to certain cases, as in the United States Courts, Act March 2, 1831, Rev. Stat., § 725, and in Pennsylvania, Act June 16, 1836, §§ 26 and 27; but this, as has been said, cannot affect the right of any constitutional court. No act of the legislature can abridge a constitutional right; and wherever this usurpation has been acquiesced in, the power simply remains in abeyance,

and if the long-suffering of the court is pushed too far, it may still be used to reach and punish the offender.

III. *What is the Proper Method of Procedure?* In most cases of constructive contempt, the proper procedure is by an affidavit to bring the facts before the court, a rule to show cause why an attachment should not issue, based on the affidavit, and an attachment in pursuance thereof, if the answer to the rule is insufficient to purge the contempt. This seems to be the uniform rule in England, as an examination of the cases previously cited will show, and also to be the general rule in America: Peo. *v.* Stapleton (the principal case), (Colo.), 33 Pac. Rep., 167; State *v.* Henthorn, 46 Kans., 613; State *v.* Vincent, 46 Kans., 618; State *v.* Kaiser, 20 Or., 50; S. C., 23 Pac. Rep., 964; Wilson *v.* Ty., 1 Wyo., 155. The affidavit is jurisdictional, and all the facts must affirmatively appear therein: State *v.* Sweetland (S. Dak.), 54 N. W. Rep., 415; Worland *v.* State, 82 Ind., 49. On the other hand, some very respectable authorities hold that when the facts are clear and unmistakable, as in the case of a newspaper article, which every man may read for himself (and why not the Court?), the Court may proceed on its own motion, or on the unsworn statement of a member of the bar: State *v.* Frew, 24 W. Va., 416; *re* Cheeseman, 49 N. J. L., 115.

IV. Another method of treating newspaper articles in contempt of court, is suggested by the decision in Myers *v.* State (Ohio), 22 N. E. Rep., 43, where it was held that the publication of paragraphs in a newspaper, copies of which were circulated in the court-room during the trial, came within the provisions of Rev. Stat. Ohio, § 5639, making punishable as contempts only misconduct in the presence of the court, "or so near thereto as to obstruct the administration of justice." It is almost invariably the case that such publications in a newspaper of any prominence find their way into the court-room, and when once there, and brought to the notice of the court, what, in the light of the last-mentioned decision, is there to prevent a proceeding for contempt even if we grant, which is not, and can never be the case, that the statutory limitations on the inherent power of the courts in this respect are valid? This is, at least, a matter for consideration.

The preceding discussion may be summarized as follows: (1) Any newspaper article, in reference to a pending cause, containing reflections on any of those engaged therein as judge, parties, witnesses, jurors, counsel, officers, etc., which tends to interfere with, impede, embarrass, or unduly influence the due and impartial administration of justice, is a contempt of court, and, as such, is punishable summarily. (2) Such a publication, made in reference to a cause already decided in the court alluded to by the article, is not a contempt by the weight of authority, though there would seem to be good reason for holding it such. (3) A mere libel on the court, by a stranger, is not a contempt. (4) Newspaper publications by attorneys or other officers of the court, libelling the court, are contempts, though they have no reference to any cause pending or past. (5) The power to punish summarily for such contempts is inherent in every

court, and can be taken away only by the power that called the court into being. Therefore, the legislature has no power to abridge or take away this power in the case of a court created by the Constitution, though it may do so as to courts of its own creation; and if any constitutional court acquiesces in such a usurpation the power merely remains in abeyance, and may be resumed at pleasure. (6) The proper method of procedure for such contempts is by affidavit setting forth all the facts necessary to give jurisdiction, a rule to show cause why an attachment should not issue, based on such affidavit, and an attachment in pursuance thereof, if the answer of the respondent is not sufficient to purge the contempt.

R. D. S.

DEPARTMENT OF CORPORATIONS.

EDITOR-IN-CHIEF,
ANGELO T. FREEDLEY, ESQ.,
Assisted by
LEWIS LAWRENCE SMITH, CLINTON ROGERS WOODRUFF
MAURICE G. BELKNAP, H. B. SCHERMERHORN.

UNITED LINES TELEGRAPH CO., ET AL., *v.* BOSTON SAFE DEPOSIT AND TRUST COMPANY.[1]

Ultra vires Purchase of Stock by Corporations.

The Bankers' and Merchants' Telegraph Company entered into a contract with The Rapid Telegraph Company whereby, in consideration of the former company building certain telegraph lines, the latter agreed to mortgage its property and issue to the former $3,000,000 of bonds. The mortgage was given to The Boston Safe Deposit and Trust Company as trustee. The next day after the agreement the Bankers' Company entered into a contract with one Bullens, reciting the agreement of the previous day, and agreeing to deposit with him, as trustee, the bonds of the Rapid Company, he agreeing to procure at least 51 per cent. of the stock of the latter and transfer it to the Bankers' Company in exchange for the bonds, dollar for dollar, the surplus of bonds to be returned with the stock after the latter had been secured. The bonds were issued and the stock transferred, and the Bankers' Company began the construction of the new lines. Before their completion the Bankers' Company became insolvent, default was made in payment of interest on the bonds, and foreclosure was commenced. Defence was made by the receiver of the Bankers' Company and by a purchaser at a receiver's sale, on the ground, *inter alia*, that the agreements were *ultra vires* of the Bankers' Company. It was found, as a fact, that the agreements had been entered into in good faith for the betterment of the condition of the two companies.

[1] 36 Fed. Rep., 288. Affirmed 13 S. C. Rep., 396.